

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
Appeals from the Michigan Court of Appeals**

Ronnie Madson, Jr.,	Supreme Court No. 154529
Plaintiff-Appellant,	
v	COA No. 331605
	On Remand
Latoya Jaso,	Lenawee County Circuit Court
Defendant-Appellee.	Case No. 11-37046-DC

Vanessa Ozimek,	Supreme Court No. 154776
Plaintiff-Appellant	
vs.	COA No. 331726
	On Remand
Lee J. Rodgers,	Wayne County Circuit Court-Family Div.
Defendant-Appellee.	Case No. 13-109046-DC

Kimberly Marie Marik,	Supreme Court No. 154549
Plaintiff-Appellee,	
v	COA No. 333687
Peter Brian Marik,	
Defendant-Appellant.	Macomb Circuit Court – Fam. Div
	Case No. 2011-0651-DM

**Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)
and Legal Services Association of Michigan (LSAM)**

- 1) Motion for Leave to File Amicus Curiae Brief; and
- 2) Combined Amicus Brief in Support of Application for Leave to Appeal re:
Jurisdiction pursuant to MCR 7.202(6)(a)(iii)

Submitted by:

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LSAM:

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**MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS AND
LEGAL SERVICES ASSOCIATION OF MICHIGAN**

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN DOCKET NOS.
154529, 153836 and 154549**

The Michigan Coalition of Family Law Appellate Lawyers ("MCFLAA"), and the Legal Services Association of Michigan ("LSAM"), state the following in support of the Motion to File Amicus Brief in Docket Nos. 154529, 153836, and 154549:

1. MCFLAA is an informal group of appellate attorneys whose practices are almost exclusively domestic relations appeals. The members of the Coalition represent both custodial and non-custodial parents, mothers and fathers, and appellants and appellees in domestic relations related appeals. The members of the Coalition frequently appear against each other on domestic relations appeals.
2. The Legal Services Association of Michigan (LSAM) is a Michigan nonprofit organization incorporated in 1982. Its members are the thirteen largest civil legal services organizations in Michigan that collectively provide legal services to low-income individuals and families in over 50,000 cases per year.¹ LSAM members have broad experience in all aspects of the child protection and custody system, including appeals, and a deep institutional commitment to ensuring that low-income families—parents and children—are treated fairly. Almost all LSAM members work daily with families involved in and impacted by the child custody system, and all LSAM members are institutionally interested in and committed to providing fair and equal access to the court system for low-income persons.
3. Recently, one of the most uncertain issues facing parties and their attorneys in family law appeals is determining whether an order is a post-judgment order "affecting" custody under MCR 7.202(6)(a)(iii) for purposes of filing an appeal of right.
4. The members of MCFLAA as well as LSAM deal with this issue on a frequent basis, and can speak to the problems created by the inconsistency and uncertainty created by the wide variation in jurisdictional orders and the apparent conflict in the Court of

¹ LSAM's members are: the Center for Civil Justice, Elder Law of Michigan, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

Appeals concerning what orders constitute post-judgment orders affecting custody under MCR 7.202(6)(a)(iii).

RELIEF

Amici respectfully request that this Honorable Court grant this motion to file the proposed *amicus curiae* brief submitted with this motion, and grant the relief requested in the attached brief.

Respectfully submitted,

/s/ Kevin Gentry P53351
MCFLAA

/s/ Ann L. Routt P38391
LSAM

Dated: December 6, 2016

STATE OF MICHIGAN
IN THE SUPREME COURT

VANESSA OZIMEK,
Plaintiff-Appellant
vs.

Supreme Court No. 153836
Court of Appeals
No. 331726

LEE J. RODGERS,
Defendant-Appellee.

Wayne County Circuit Court-Family Div.
Case No. 13-109046-DC

Vanessa Ozimek,
Plaintiff-Appellant
vs.

Supreme Court No. 153836
COA No. 331726
On Remand

Lee J. Rodgers,
Defendant-Appellee.

Wayne County Circuit Court-Family Div.
Case No. 13-109046-DC

Kimberly Marie Marik,
Plaintiff-Appellee,
v

Supreme Court No. 154549
COA No. 333687

Peter Brian Marik,
Defendant-Appellant.

Macomb Circuit Court – Fam. Div
Case No. 2011-0651-DM

**MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS (MCFLAA)
LEGAL SERVICES ASSOCIATION OF MICHIGAN (LSAM)**

**COMBINED AMICUS CURIAE BRIEF re:
7.202(6)(a)(iii)**

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Statement of Jurisdiction/Order Being Appealed

All three cases are before this Court on Application for Leave to Appeal. All three cases raise the issue of what constitutes a final order – a post-judgment order affecting custody under MCR 7.202(6)(a)(iii). In all three cases, the Court of Appeals found that the orders did not fall under the court rule, contrary to previous Court of Appeals' practice and case law.

Question Presented

Should this Court grant leave to appeal in all three cases to address what orders fall within MCR 7.202(6)(a)(iii), or alternatively, remand these three appeals to the Court of Appeals as appeals of right?

Amici answer Yes.

Statement of Facts

Amici adopt the Appellants' Statements of Facts from the applications for leave to appeal in the three appeals.

ARGUMENT

- I. This Court should grant leave to appeal in all three cases to address what orders fall within MCR 7.202(6)(a)(iii), or alternatively, remand these three appeals to the Court of Appeals as appeals of right.

Whether to grant an application for leave, as well as an amicus request, are decisions within the discretion of this Court. MCR 7.303(B); 7.305; 7.316(A). This application involves a significant jurisdictional issue which affects a large number of domestic relations appeals – what constitutes a final order “affecting custody” under MCR 7.202(6)(a)(iii). The issue involves access to the courts, and more specifically, access to the appellate courts through an appeal of right which guarantees appellate review.

MCR 7.202(6)(a)(iii) provides that a post-judgment order “affecting” the custody of a minor is a final order appealable by right. The rule does not limit the definition of custody. The rule language (“affecting” custody) has been broadly interpreted by the Court of Appeals in *Wardell v Hincka*, 297 Mich App 127, 131-33; 822 NW2d 278 (2012) and *Rains v Rains*, 301 Mich App 313, 321, 323-324; 836 NW2d 709 (2013). Child custody in Michigan is governed by the Child Custody Act, MCL 722.21 *et seq*, and custody under the Act is made up of physical and legal (parental decision-making) components. See MCL 722.26(a)(7); *Grange Insurance v Lawrence*, 494 Mich. 475, 511, 835 NW2d 363 (2013).

Ozimek and Marik:

Both *Ozimek* and *Marik* involve post-judgment orders concerning legal custody – which is parental decision-making. Legal custody includes important decisions

concerning children - e.g., religious, educational, and associational decisions. See e.g. *See Meyer v. Nebraska*, 262 U. S. 390, 399, 401 (1923) (the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own”); *Troxel v Granville*, 530 US 57, 120 S.C. 2054, 147 L Ed 2d 49 (2000) (parental care, custody, and control of children - including associational and decisions - comprise perhaps the oldest of the fundamental liberty interests). The Child Custody Act recognizes that custody is made up of physical custody of a child as well as parental decision-making. MCL 722.26(a)(7); *Grange Insurance v Lawrence*, *supra* 494 Mich. at 511 (recognizing the dual aspects of custody).

Appellant’s application discusses some of the cases in which appeals of post-judgment orders deciding educational issues between joint legal custodians are appeals of right. See e.g. *Lombardo v Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993); *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) (appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians); *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), *aff’d* 486 Mich 81 (2010) (an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree) as well as recent conflicting cases, including *Ozimek* and *Marik*, where the Court of Appeals has entered jurisdictional orders dismissing such appeals.

The decision in *Ozimek* mentions the effect of finding jurisdiction on the Court of Appeals docket Filings in the Court of Appeals are apparently down over the past few years. And, such considerations are not relevant to whether the Court has jurisdiction

under the court rule.

The *Ozimek* decision creates a new limited definition of child custody that conflicts with both statute and case law. The Court of Appeals has since applied *Ozimek* to dismiss appeals such as *Marik*.¹

***Madson*:**

Madson involves a post-judgment modification of parenting/custodial time. The modification involved in *Madson* affects child custody – where a child spends his or her time, the influences on the child, the custodial environment, as well as the ability of a parent to exercise physical custody and decision-making.

In *Madson*, Appellant argues that the Court of Appeals erroneously concluded that the trial court's February 2, 2016 order was not "final" under MCR 7.202(6)(a)(iii). The panel appeared to base its decision largely on the fact that the trial court's order was, according to the Court of Appeals, only an interim "makeup parenting time" order. (08/25/16 COA Order, pp. 1, 4, 6). But the parenting time order did not purport to be simply makeup parenting time and had no end date. (See 02/02/16 Order). It was seemingly intended as an indefinite change of parenting time until the trial court made a final custody decision. A change of custody need not be permanent to be an order affecting custody under MCR 7.202(6)(a)(iii). See *Surman v Surman*, 277 Mich App 287,

¹ See also *Riemer v Johnson*, October 5, 2016 Order (COA docket no. 334934), citing *Ozimek*:

"[a]n order that only affects legal custody of a child, without affecting physical custody, is not an order affecting 'custody' within the meaning of that term as used in MCR 7.202(6)(a)(iii). *Ozimek v Rodgers*."

294; 745 NW2d 802 (2007)(discussing final post-judgment orders under MCR 7.202(6)(a)(iii)).

The trial court awarded Defendant near-exclusive parenting time, with Plaintiff-Father receiving only every other weekend. (02/02/16 Order). Plaintiff-Father was the primary physical custodian of the child. By reducing his time to only every other weekend, the order effectively shifted primary physical custody to Defendant-Mother, dramatically increasing her parenting time and taking away Plaintiff-Father's primary physical custody. The trial court did this with apparently no consideration of established custodial environment, application of the correct burden of proof, or analysis of the best interests of the child.

Conclusion:

The court rule recognizes the unique position of children in our legal system by providing that appeals of post-judgment orders affecting custody are to be treated differently than many other post-judgment orders.

And because these cases involve child custody, it is all the more important that there be consistency – hence certainty – in addressing the jurisdictional threshold. Inconsistency in treatment of post-judgment orders concerning custody (both physical and legal) creates delay, additional litigation, and added emotional and financial expense.

The inconsistency in treatment also affects access to justice for the families that are denied an appeal of right. There is a difference between a guaranteed appellate review and the appellate process in addressing appeals of right compared to the process

involved in deciding applications for leave to appeal.

The instant cases were incorrectly decided. The Court of Appeals created its own definitions of custody and what “affects” custody contrary to statute and case law. Amici request that this Court grant leave to appeal, grant oral argument on the applications, or alternatively remand the cases to the Court of Appeals as appeals of right.

RELIEF

Amici respectfully request that this Court grant leave to appeal, grant oral argument on the applications, or remand the cases to the Court of Appeals as appeals of right.

Respectfully submitted,

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Dated: December 6, 2016